File

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SUPERIOR COURT CLERK
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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

THE STATE OF WASHINGTON, Plaintiff, v. ELIZABETH JOY HOKOANA, MARC K HOKOANA AND EACH OF THEM, Defendants.	No. 17-C-02989-7 SEA 17-C-02990-1 SEA STATE'S TRIAL MEMORANDUM

CHARGES

Count One: The State alleges Elizabeth Hokoana committed **Assault In The First Degree – Firearm Enhancement** when she shot Joshua Dukes in the abdomen while Mr. Dukes was attempting to stop her husband, Marc Hokoana, from shooting pepper spray at bystanders on January 20, 2017.

Count Two: The State alleges Marc Hokoana committed **Assault in the Third Degree** when he shot pepper spray at Jane Doe on January 20, 2017.

AMENDMENT

The State moves to amend Count Two to change the description of the weapon from "OC Pepper Spray" to just "pepper spray."

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

SCHEDULING

This trial is expected to last 25 days, including motions and jury selection. The State anticipates its case in chief will last about ten days.

A brief CrR 3.5 hearing, with two witnesses, is required. The State anticipates given the length of the trial and the publicity, jury selection will run at least until Monday, June 17.

One expert witness, Grant Fredericks, has indicated he is only available to testify June 13, 14, and 28 (a Friday). He is not available again until July 22. As of this writing, the State was endeavoring to contact the witness to see if other times are available during normal trial days. If he is not, the State respectfully requests the Court to consider being in session the morning of Friday, June 28, to take the witness's testimony. Defense counsel has indicated they would be available that morning. The prosecutor is hoping to maintain a pre-scheduled vacation that afternoon of June 28, however. Alternatively, the State has proposed to defense a preservation deposition, which could be done while in session, this Thursday, June 13. A videographer is available.

WITNESSES

UW Police
Schultz, Douglas - Lead
Bergin, William
Coffin, Siitupe
Greany, Donald
Wilson, Craig
Kendrick, Robert
Bentley, Chris

Seattle Police
Eastman, Michael
Rees, Brian
Ritter, Jim
Truscott, Lauren
Wartts-Smiles, Dahmar

Civilians
Dukes, Joshua –Victim
Filo, Blake
Frites, Samie
Krueger, Benjamin
Neiwert, David
Portante, Kathryn
Tommasini, David
Wells, Sheldon ("Mark")
Kukyendall, Stephen
St. Hilaire, Alex
Caley, Brandon

Experts
Fredericks, Grant – Video
Hallimore, David – Audio
Hudson, Renee – Ballistics
Jagmin, Amy – DNA
Keiran, Thomas. Jr. – SFD
Anderson , Kelli – Prints
Schenold, Terrence – Gaming

Rebuttal
Alexander, Kirk MD
Moshay, Jillian Sturm, MD
Magnuson, Chad, MD

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
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STATEMENT OF FACTS

Friday, January 20, 2017, was already expected to be a notable day in the history of this country and Seattle. Not only was a polarizing president-elect about to be sworn in, but an alt-right celebrity provocateur named Milo Yiannopoulos was slated to speak at the University of Washington at the invitation of the College Republicans. A former editor at the far-right website Breitbart, Yiannopoulos was coming to the auditorium at Kane Hall as part of his campus speaking tour. The name of his tour – "The Dangerous Faggot Tour" – is deeply offensive, but is part of the backdrop of what occurred. Donald Trump's inauguration, coupled with the appearance of Yiannopoulos in the heart of Seattle, was roiling the city in the preceding days. While the Women's March was slated to occur the next day, a smaller anti-Trump march was planned for downtown Friday evening. Counter-protests were expected on campus at the Yiannopoulos event as well.

Ticketholders began lining up for the Yiannopoulos spectacle early in the afternoon. By evening, attendees waiting to enter Kane Hall stretched across Red Square, a large brick plaza on the Seattle campus. Many of them wore Trump's signature red "Make America Great Again" hats. Police were largely stationed at the top of some steps leading up to Kane Hall. As the evening grew dark, a procession of counter-protesters marched into the square under the banner of "Antifa." Short for "anti-fascist," Antifa is a left-leaning political protest movement that has cropped up at right-wing events. The Antifa protesters were readily identifiable by their black clothes, Antifa banners, and masks concealing their faces (purportedly to prevent their images from being posted online). Antifa is also associated with the anarchist movement and Black Bloc, named for the tactic of appearing as one large unified group at alt-right events.

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Criminal Division
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Cell phone video footage captured the moment when Antifa arrived in the back of the chanting and marched to the steps in front of Kane Hall, blocking the entrance to the Yiannopoulos event. Importantly, the video makes clear that Joshua Dukes, the gunshot victim, was not part of the procession. As the Antifa protesters took their position, they occasionally broke into chants and exchanged insults with the Yiannopoulos supporters. Several witnesses will testify that they observed the Antifa protesters engage in violence through rocks, paint balloons and fists. Scores of counter-protesters not affiliated with Antifa were also in the square peacefully protesting. A number of individuals also served as "peacekeepers" by putting their bodies between would-be combatants.

Into this chaotic stew walked a married a couple named Marc and Elizabeth Hokoana. The first time the defendants appear on video is at 6:10 pm. In the video, Marc grins beneath his red MAGA hat. Elizabeth wears a winter coat and pigtails. Their exuberance at the inauguration of President Trump and eagerness to square off with counter-protesters is captured in video throughout the night. As the defendants got in line to enter Kane Hall, they made chipper small talk with other attendees. But as the evening wore on, and there was no sign of movement in the line to get in, the defendants and other attendees grew increasingly frustrated with the Antifa protesters that appeared to block the entrance. Eager to mix it up with protesters, Marc Hokoana repeatedly left his place in line and approached the Antifa group. One witness, Seattle Police Sgt. Jim Ritter, remembers seeing the defendant wade through the protesters yelling pro-Trump messages and trying to instigate a fight. It did not take Marc Hokoana long to find what he was looking for. Cell phone video captured the defendant at 6:19 pm brawling with another man in front of Kane Hall. The two men wrestle each other to the ground even as a woman yells, "Stop! Stop it!" Bystanders intervened and struggled to

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

separate the defendant from the other man. When he was through, the defendant boasted to one witness that he "won" the fight, declaring that "Those snowflakes don't know how to fight!" It would not be the last time Marc Hokoana was heard using the snowflake label. After his face-offs with the Antifa protesters, Marc Hokoana would return to Elizabeth in line and regale her and other attendees with accounts of his clashes. One Yiannopoulos attendee, 17-year-old Alex St. Hilaire, remembers the defendant crowing that he had exchanged punches with a protester, adding, "They don't even know how to bench!"

Inspired by the defendant, St. Hilaire also walked to the front where Antifa was gathered at about 7:53 pm. What happened next is somewhat unclear, but St. Hilaire will testify that he was merely attempting to get a closer look at a protester sign reading, WOMEN HOLD UP HALF THE SKY. St. Hilaire found the sign "ridiculous." As he approached Antifa, St. Hilaire remembers that one of the protesters grabbed his red-white-and-blue MAGA hat. When St. Hilaire reached to retrieve it, St. Hilaire says he was pulled into the scrum of Antifa protesters, where he was punched and struck with a blue paint balloon. St. Hilaire was pulled out from the crowd with blue paint on his face and blood running down his nose. As St. Hilaire emerged from the Antifa protesters, an animated Marc Hokoana ran towards them. Video captures Marc Hokoana standing inches from the protesters excitedly speaking and gesticulating with his hands. Elizabeth Hokoana follows close behind and is seen reaching beneath the back of her jacket where police would later learn

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
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Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

she had a handgun holstered. Marc Hokoana then turns around grinning and sees his wife with her hand positioned on her gun. The video captures Marc Hokoana speaking to his wife. The audio on the video has been enhanced by an expert (David Hallimore), and Marc Hokoana can be heard telling his wife, "Calm down! Don't shoot anyone." But Marc Hokoana was not interested in calming anyone down. What he says next reveals his true intentions. On the video, he excitedly turns to a man in a red MAGA hat and, according to the enhanced audio, declares, "They have to start it! They have to start it!" Marc Hokoana then walks up to St. Hilaire, covered in paint, and gives him a bear hug, bellowing, "Yeaaaah!"

The growing tensions emboldened Marc Hokoana. UW undergraduate student David Tommasini remembers Marc Hokoana approaching and asking if he could stand behind Tommasini so that he could pepper spray some protesters. Tommasini refused. Tommasini will testify that some time later Marc Hokoana began shooting pepper spray into the crowd.

ii. Victim Joshua Dukes

It was Marc Hokoana's pepper spray that first caught the attention of victim Joshua Dukes. And it nearly cost him his life.

Because the victim is not expected to testify, the State will rely on video footage and eyewitness testimony to establish the victim's actions that night. The victim is 35 years old and a resident of Seattle. His friend, Ben Krueger, remembers meeting up with the victim in Red Square, but they only hung out a couple times throughout the evening. Much has been written in the media and documented by the defense about the victim's political leanings. But although the victim at times mingled with the Antifa protesters, he was not visibly affiliated with them. Video and eyewitness evidence establish that the victim was not part of the procession of Antifa

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
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Seattle, WA 98104-2385
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protesters who entered the square. Nor did the victim cover his face – the telltale sign of Antifa – or carry a sign. The victim was merely observing the scene throughout the evening.

Veteran journalist David Neiwert remembers seeing the victim early in the evening. Neiwert was at Red Square to document the event for the Southern Poverty Law Center's Hatewatch website, a blog that "monitors and exposes the activities of the American radical right." Neiwert makes a point of observing individuals at protests, both to ensure his own personal safety and to track potentially dangerous individuals. Neiwert observed the victim several times throughout the evening. Initially, Neiwert looked at the victim's shaved head, tall, imposing figure and black leather jacket and believed the victim might be a neo-Nazi skinhead. But as Neiwert observed the victim, he realized that the victim was actually trying to keep the peace. Both Neiwert and Krueger saw the victim repeatedly place his body between potential combatants in order to deter violence. Several video clips show the victim silently standing between arguing protesters and attendees, using his tall, muscular body as a barrier against violence.

iii. Provocation and a Shooting

At about 8:24 pm, nursing student Samie Frites was standing in Red Square trying to keep the peace. Frites had come to the university because he knew that too often these sorts of events deteriorate into violence. Frites remembers he was confronting an Antifa protester about their tactics, when, out of nowhere, he saw Marc Hokoana run towards Antifa. Frites watched as Marc Hokoana struck a pose, with one foot in front of the other, and fired a rectangular object that resembled a Taser at the Antifa protesters and at Dave Neiwert, the journalist from the Southern Poverty Law Center. Frites turned to Marc Hokoana and said, "Put the damn Taser away!" The moment was captured on video and dissected, still by still, by the State's

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
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video expert. The video shows the defendant's reddish pepper spray and the victim standing several feet away observing the defendant fire. Importantly, the victim, shown beneath the line on the left in the image above, was not a target of Marc Hokoana's antics. Hokoana shrugged Frites off and backed up a couple steps. As this was happening, journalist Neiwert had just had his cell phone knocked from his hand by a protester and was trying to retrieve it off the ground. When Neiwert assured the protesters that he was from the Southern Poverty Law Center, they allowed him to reach down and grab his phone. As he bent over, Neiwert got a large dose of Marc Hokoana's pepper spray and began to gag. (Later, when Neiwert examined the jacket he was wearing, he realized he had actually been hit by Hokoana's stream of spray.)

The video captures what happens next. Seeing Marc Hokoana shoot his pepper spray, the victim moves through the crowd and grab Hokoana, trying to pry the weapon from his hand. The defendant resists and tries to pulls away. In the video, a small object consistent with pepper spray is visible in Marc Hokoana's hand as he grapples with the

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
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victim. As the two men wrestle, Frites, the nursing student, grabs ahold of the victim with two hands and pulls the victim off of the defendant, creating space between them. Despite this, Elizabeth Hokoana steps forward and appears to extend her arm towards the victim. Elizabeth Hokoana's actions on the video are not entirely clear, but the result is: she shoots the victim point blank in the abdomen. The video then shows the defendants immediately leaving the area, as the victim falls to the ground.

iv. Shooting Aftermath

Police swarmed in and transported the victim to an emergency staging area. Seattle firefighter Keiran used trauma sheers to remove the victim's jacket. As this was happening, SPD Sgt. Truscott saw two knives and a hand strengthener with the victim's belongings. Misidentifying the hand strengthener, Truscott erroneously broadcast over police radio: "Victim did not provide any info. Victim was armed with brass knuckles and a large knife." The victim was transported to Harborview Medical Center with life-threatening injuries.

Police eventually taped off the crime scene and searched for shell casings but found none. As University of Washington Police struggled that night to identify the shooter, tips and video footage poured in. The shooting made national headlines.

At about 11:20 pm that night, the defendants walked into the UWPD headquarters. Marc Hokoana had his hands in the air. Marc Hokoana said something to the effect of, "I am here to report a self-defense shooting," adding, "the gun is in the trunk." (The State will move to exclude this statement as hearsay.) Marc Hokoana was arrested, his wife was not initially. Elizabeth Hokoana waited for her husband in the UWPD lobby. Officer Craig Wilson questioned Elizabeth Hokoana as she sat in the lobby. Hokoana stated that the couple's car, a Chevy Malibu, was parked in the church parking lot on the south side of the station. She

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

provided the car keys. Hokoana repeatedly said the male she was with was her husband and that they had been on campus earlier in the night. Wilson then stepped outside to run the plates on the car. Returning to the lobby, the officer asked who the vehicle was registered to, and Hokoana said it belonged to her. Wilson informed Hokoana that the vehicle would be impounded, and she responded something to the effect of, "We brought the vehicle here, and the gun is in the trunk." When asked if she wanted to make a statement and give consent to allow police to retrieve the gun, she hesitated and stated, "I want to talk to my lawyer first." Wilson did not ask any further questions. Later, a second UWPD officer, Robert Kendrick, approached Elizabeth Hokoana and offered her a ride home. Hokoana stated she did not want to go home and repeatedly asked about her husband and what was happening with her car. Hokoana repeatedly requested an attorney. Kendrick told her she could speak to an attorney at any time and suggested she use the phone book or conduct a Google search on her phone. Hokoana responded that she could not afford an attorney and asked for a public defender. Kendrick and other officers advised Hokoana that public defenders were only available to suspects. Hokoana responded that she wished to be considered a suspect. Detective Sgt. Bergin eventually placed her under arrest.

v. Police Investigation

The investigation was assigned to UWPD Lt. Doug Schultz. At 1:47 am on January 21, Schultz drove to HMC where the victim was sedated and intubated following surgery.

On January 22, Seattle Police and Schultz did a warrant search of the defendants' vehicle. Police recovered a Glock 26 9 mm semiautomatic pistol from the trunk. The pistol was in a black leather paddle holster and packaged in a plastic bag. The pistol had a magazine, and eight of the ten rounds remained. A spent round was located lodged inside the ejection

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
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Seattle, WA 98104-2385
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port. Police found several firearm receipts, including that of the Glock, in the glove compartment. Later that afternoon, Schultz met with the victim at HMC and found him to be weak and unable to complete sentences. The victim declined to provide a recorded statement and asked to wait a few days for an interview. On January 24, the victim told Schultz at the hospital that he wanted all communication to go through his attorney, Sarah Lippeck. On January 25, the victim provided a recorded statement and signed a medical release.

Police went to the defendants' apartment at 7017 35th Avenue NE in Seattle on January 27 to conduct a warrant search. The defendants stated that the clothes the police were looking for were in the laundry area. Sgt. Bergin and Det. Coffin located the bag of clothes and found Marc Hokoana's pepper spray device, Kimber PepperBlaster, sitting on top of the clothes. The defendants refused to have the pepper spray seized, stating they wanted to consult their attorneys first. (Months later, the State purchased an identical pepper spray device, and Schultz video-recorded himself and Officer Sletten spraying the weapon at a target 13 feet away. The video will be offered into evidence.)

On February 8, 2017, Bergin obtained Marc Hokoana's Facebook profile and messages using a warrant. The records reveal that on the afternoon of January 19, 2017, Marc Hokoana exchanged several messages with a high school friend named Brandon Caley. Caley is a defense witness who has been cross-endorsed by the State. In the first message, Caley sends Hokoana the song, "One Day More" from the musical *Les Misérables* with the caption, "We be like." Caley will testify that the song is about an uprising in the streets of Paris. Hokoana responds, "Lol." Hokoana then writes:

> I can't wait for tomorrow, I'm going to Milo event and if the snowflakes get out off hand I'm just going to wade through their ranks and start cracking skulls.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
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Caley responds: "Fucking do it." Next, Caley asks if Hokoana is "gonna carry?" Hokoana responds, "Nah, I'm going full melee." Although Merriam-Webster defines melee as a "confused struggle" suggesting a hand-to-hand fight, evidence suggests Hokoana had a more nuanced meaning. "Melee" is a term of art in the world of online and tabletop roleplaying games, such as Dungeons and Dragons. Hokoana's Facebook "groups" confirm that he is a committed "gamer," and Caley will testify that he has played games with the defendants, both online and in-person, for years. Expert witness Terrence Schenold[1] will testify that melee in the context of gaming usually refers to a type of close-range combat between characters in a game, though it may also refer to a type of weapon, such as a sword, as opposed to a bow or a gun. Caley has also confirmed the term's meaning in the context of video games that he has personally played with Marc Hokoana. As it turns out, Marc Hokoana's Facebook messages accurately predicted his egregious physical behavior in Red Square, undermining the claim that his pepper spray was shot in defense of others.

But that is not all. The Facebook messages reveal that after Marc Hokoana says he is going "full melee" at the Yiannopoulos event, he states that Elizabeth Hokoana, known as "Lily," will be "carrying." Caley responds, "just don't end up in jail." Hokoana responds, "lol, deus vult," a Catholic motto associated with the Crusades that means "God wills it." Caley then writes, "GET EM… fuck it" and forwards a song called "Kill Them All Starship Troopers" from the 1997 military science fiction film Starship Troopers. Next, the two friends discuss

[1] Schenold is a part-time lecturer and PhD candidate at the University of Washington. His areas of study include game studies, digital media studies, and aesthetics in interactive media. He is a founding member of the Critical Gaming Project at UW, which was an interdisciplinary project bringing graduate students together to facilitate the study of games on campus. Schenold was the subject of an August 29, 2014 Seattle Times article about the study of computer games.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

their excitement about Trump's inauguration the next day. Hokoana then shares an image of a masked ninja wearing a Trump button and holding a large sword captioned, "Listen up liberal scum. I'm here to stick up for the billionaires."

The two men continue to egg each other on in their Facebook exchange. Caley shares with Hokoana a YouTube video entitled, "Gavin McInees Gets Into a Fist Fight at the #DeploraBall." McInees is a far-right political commentator that shares views with Yiannopoulos. "DeploraBall" is a reference to then-candidate Hillary Clinton referring to Trump supporters as a "basket of deplorables." In the 32-second video obtained by the State, McInees throws a punch at a man wielding an Antifa flag. In response to this video, Hokoana writes, "Lol, me tomorrow night." Caley encourages him some more, writing, "Get em."

Caley next writes that Seattle is going to be a "war zone… I honestly can not wait." Hokoana responds, "Me either."

In addition to Marc Hokoana's Facebook page, Schultz was able to learn through the internet about Elizabeth Hokoana's knowledge and access to firearms, an important detail where the State's case in chief against her is largely circumstantial. Schultz found a professional photograph of Elizabeth Hokoana attending a "Guns Across America Rally" in Olympia on January 19, 2013. Elizabeth Hokoana is shown carrying a Glock 26 9 mm pistol, the same type of pistol recovered from her vehicle. The pistol is also the same class as the bullet removed from the victim's body. She is also shown with a shoulder holster, which is consistent with her hand movements in reaching for the gun at the time of the shooting.

On February 16, 2017, Schultz used a warrant to collect DNA and fingerprints from both defendants at UWPD. Kimberly Gordon was present.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

On March 7, 2017, Steve Wells emailed Schultz stating that Elizabeth Hokoana would be willing to do an interview so long as there was an agreement in place that her statement would only be used as impeachment at trial. On March 16, Elizabeth Hokoana submitted to a recorded interview with Schultz in which she admitted to the shooting and claimed she was acting in defense of her husband. Hokoana claimed she saw a knife in the victim's hand. Elizabeth Hokoana made the claim about the knife only after it was revealed through discovery that the victim had two knives on his person at the time of the shooting. Under the terms of the proffer agreement, the State agreed not to use Elizabeth Hokoana's interview in its case in chief. Marc Hokoana was not interviewed, though he participated in a video-recorded reenactment of the event.

vi. Forensic Evidence

The Washington State Patrol Crime Lab found ten latent prints on the plastic bag that carried the gun collected from the defendants' vehicle. They all matched Elizabeth Hokoana. No prints were recovered from the gun itself. Elizabeth Hokoana's DNA was found on the recovered magazine and the rear of the slide.

The crime lab also determined the fired bullet recovered from the victim had similar class characteristics as the gun but could not conclusively identify or eliminate it as having been fired from the pistol. The lab also examined the front left torso area of the victim's sweatshirt and determined gunshot residue was consistence with the muzzle coming into contact with the victim or close to it.

Certified Forensic Video Analyst Grant Fredericks, an expert witness, also reviewed much of the cell phone and other video collected from Red Square. Fredericks was able to track the movement of the defendants throughout the evening, create a chronological order of events

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

with time stamps, describe the movement of Elizabeth Hokoana's arm during the shooting, and compare the object seen in Marc Hokoana's hand at the time of the pepper spray to the pepper spray seen in his apartment during the search.

vii. Victim's status

The victim has given repeated interviews to the police and the media. He has maintained that he does not wish to participate in this case and objects to the criminal justice system. Senior Deputy Prosecuting Attorney Raam Wong met with the victim, his family and his attorney in his home earlier this Spring, and the victim reiterated that he did not wish to participate in a defense interview or testimony. Last week, defense obtained an order for his deposition, but the victim did not appear for the deposition.

EVIDENTIARY MOTIONS

1. CrR 3.5: Motion to admit defendants' statements to police

The State seeks a CrR 3.5 hearing on the following statements to police: (1) Elizabeth Hokoana's out-of-custody statements on January 20, 2017 and (2) both defendants' out-of-custody statements to police during the search of their apartment. The State will call two witnesses during the hearing.

An individual has the right to be free from compelled self-incrimination while in police custody. U.S. Const. amend. V; U.S. Const. amend. XIV; Miranda v. Arizona, 384 U.S. 436, 444 (1966). To protect this right, law enforcement is required to provide Miranda warnings to a person in custody before that person is subjected to interrogation. Miranda, 384 U.S. at 479. Miranda rights are only triggered when a suspect is (1) "in custody" and (2) subject to "interrogation." Oregon v. Mathiason, 429 U.S. 492, 495 (1977). "In custody" for purposes of

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
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(206) 296-9010, FAX (206) 296-9009

Miranda means freedom of action curtailed to a degree associated with formal arrest. Berkemer v. McCarty, 468 U.S. 420 (1984). A statement that was obtained in compliance with Miranda may still be excluded from evidence if the confession was not voluntarily given. The test in determining whether a confession is voluntary is whether the behavior of the law enforcement officials was such as to overbear the defendant's will to resist and bring about confessions not freely self-determined. *See e.g.,* State v. Tucker, 32 Wn.App. 83, 85 (1982); State v. Forrester, 21 Wn. App. 855, 863 (1978).

The burden is on the State to prove the voluntariness of a statement. It need only do so, however, by a preponderance of the evidence. State v. Braun, 82 Wn.2d 157, 162 (1973); State v. Davis, 34 Wn. App. 546, 550 (1983). If multiple police officers are present when a defendant waives his Miranda warnings, the State need not call each and every officer at the admissibility hearing. State v. Abdulle, 174 Wash. 2d 411, 420 (2012). The defendant need not understand the legal consequences of giving an incriminating statement, possible defenses available, or the risks involved in speaking to the police without counsel present. *See* State v. McDonald, 89 Wn.2d 256, 264 (1977), *overruled in part by* State v. Sommerville, 111 Wn.2d 524, 531 (1988).

i. Elizabeth Hokoana's January 20, 2017 statements were noncustodial

In this case, the defendants appeared at UWPD headquarters hours after the shooting. Marc Hokoana had his hands up as he stated, "I'm here to report a self-defense shooting." The State does not intend to offer this self-serving hearsay in its case in chief and will move to exclude it. Marc Hokoana was then arrested. While he was being booked, Elizabeth Hokoana waited for him in the lobby of UWPD. She was not in custody. Officer Craig Wilson questioned Elizabeth Hokoana as she sat in the lobby. Elizabeth Hokoana stated that the couple's car, a Chevy Malibu, was parked in the church parking lot on the south side of the

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(206) 296-9010, FAX (206) 296-9009

station. She provided the car keys. Elizabeth Hokoana repeatedly said the male she was with was her husband and that they had been on campus earlier in the night. Wilson then stepped outside to run the plates on the car. Returning to the lobby, the officer asked who the vehicle was registered to, and Hokoana said it belonged to her. Wilson informed Hokoana that the vehicle would be impounded, and she responded something to the effect of, "We brought the vehicle here and the gun is in the trunk." These statements should be admitted because they were voluntarily made before Elizabeth Hokoana was in custody.

(The State will not offer her subsequent statements where Officer Wilson asked if she wanted to make a statement and give consent to allow police to retrieve the gun. Her response was, "I want to talk to my lawyer first." Later, a second officer, Robert Kendrick, approached Elizabeth Hokoana and offered her a ride home. Hokoana stated she did not want to go home and repeatedly asked about her husband and what was happening with her car. Hokoana repeatedly requested an attorney. Kendrick told her she could speak to an attorney at any time and suggested she use the phone book or conduct a Google search on her phone. Hokoana responded that she could not afford an attorney and asked for a public defender. Kendrick and other officers advised Hokoana that public defenders were only available to suspects. Hokoana responded that she wished to be considered a suspect. Detective Sgt. Bergin eventually placed her under arrest.)

ii. The defendants' January 27, 2017 statements are noncustodial

Lt. Schultz appeared at the defendants' apartment on January 27, 2017 to conduct a warrant search. The defendants let Schultz and other officers in, and both defendants stated the

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
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(206) 296-9010, FAX (206) 296-9009

clothes the police were looking for were in the laundry area. These statements are admissible because they were voluntary and noncustodial.

2. Motion to exclude defendants' statements if offered by the defense, including Marc Hokoana's statement, "I am here to report a self-defense shooting."

The State moves to exclude all of the defendants' statements, if offered by the defense, including Marc Hokoana's statement to the police in which he reported a "self-defense shooting." Hearsay is a statement offered to prove the truth of the matter asserted. ER 801(c). Statements by a party are not hearsay only when offered against that party. See ER 801(d)(2). The Court of Appeals explained:

> If an out-of-court admission by a party is self-serving, in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible... the net effect of defendant's attempt to introduce the out-of-court, self-serving statement is to place defendant's version of the facts before the jury without subjecting the maker thereof, defendant, to cross-examination. To do so would deprive the State of the benefit of testing the credibility of the statements and thereby deny the jury an objective basis for weighing the probative value.

State v. Huff, 3 Wn. App. 632, 636 (1970); see also State v. Finch, 137 Wn.2d 792 (1999) (defendant not allowed to call witness to recount his exculpatory out-of-court statement).

State v. Haga, 8 Wash.App. 481, 494–495 review denied, 82 Wash.2d 1006 (1973) is on point. In that case, the defendant sought to admit statements he made to the police the day after a homicide denying any involvement in the crimes. Division One held that the statements were properly excluded. The Court reasoned "if an out-of-court admission by a party is self-serving, in the sense that it tends to aid his case, and is offered for the truth of the matter asserted, then such statement is not admissible under the admission exception to the hearsay rule." Id.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

In this case, Marc Hokoana's out-of-court statement is both self-serving and offered for the truth of the matter asserted, namely that his wife acted in self-defense. Whether Elizabeth Hokoana's actions were in defense of her husband goes to the very heart of this case. Admission of his self-serving statement would place his "version of the facts before the jury" without subjecting him to cross-examination.

Moreover, no hearsay exception applies. Several hours passed between the time of the shooting and the defendants turning themselves in. They had time to deliberate and plan what they would claim to the police.

The State also moves to preclude either defendant from testifying about Marc Hokoana's statement while on the stand. The definition of hearsay includes prior out-of-court statements by a person who is in court and is testifying as a witness. Thomas v. French, 99 Wash. 2d 95 (1983) (letter written by witness was hearsay). "The hearsay rule does not disappear simply because the out-of-court declarant is now present in court." 5D Wash. Prac., Handbook Wash. Evid. ER 801 (2018-2019 ed.) The State requests that counsel specifically instruct the defendants not to testify about these statements.

3. Motion to preclude defense from eliciting during the State's case the fact that Elizabeth Hokoana submitted to a proffer interview

Prior to filing this case, Elizabeth Hokoana submitted to a "proffer interview" to give her the opportunity to convey truthful information about the events surrounding the shooting. Before the interview, the State assured Hokoana that "nothing Ms. Hokoana says in the… interview will be introduced against her by the prosecution the State's case-in-chief in a trial should charges be filed. . ." The defense should be precluded from eliciting in the State's case in chief that Hokoana participated in the interview because it lacks relevance, is unfairly

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

prejudicial to the State and would waste time. ER 403. Admission of such testimony during the State's case in chief would likely be for the purpose of suggesting that Hokoana was cooperative and candid with law enforcement, and yet the State filed charges anyway. The fact is, however, that Hokoana was less than candid in her interview; she repeatedly contradicted herself and made statements that contrasted sharply with the other known, objective evidence. But the State is precluded under the terms of the agreement from highlighting these contradictions. The State also cannot explain its thought process in filing charges. Thus, eliciting the fact that she submitted to an interview during the State's case in chief would permit the defense to tell a one-sided story suggesting she cooperated fully and honestly with the investigation when that is far from the truth.

4. Motion to exclude defendants' lack of criminal history or prior bad acts and character as "law abiding citizens"

The State moves to exclude mention of the fact that the defendants lack criminal history or prior bad acts or to suggest they are "law-abiding citizens." Such evidence is inadmissible character evidence. ER 404(a) and 405.

State v. Mercer-Drummer, 128 Wash. App. 625, 629 (2005) is directly on point. Mercer-Drummer was charged with assault. The trial court granted the State's motion to preclude the defendant from testifying that she had no criminal history. The defendant argued that under ER 405(b), being a law abiding citizen is an essential element of a defense in any criminal trial. The Court disagreed, reasoning "[A] character trait of being a law abiding citizen is not an essential element of assault. . ." Id (emphasis added). The Court quoted the Washington Supreme Court, stating:

> Character is an 'essential element' in comparatively few cases. In criminal cases, character is rarely an essential element of the charge, claim or defense.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

> For character to be an essential element, character must itself determine the rights and liabilities of the parties.

Id. quoting State v. Kelly, 103 Wash 2d. 188, 196-97 (1984).

Mercer-Drummer held that character does not determine a party's rights and liabilities incident to an assault. Therefore, it is not an "essential" element of assault, nor is it a defense to the charge. Thus, the trial correct "correctly excluded Mercer Drummer's evidence of being a 'law-abiding citizen'" Id. Moreover, "ER 405(a) does not permit proof of character in the form of an opinion, especially a defendant's own opinion." Id. Therefore, a defendant herself cannot testify that she lacks an arrest record or is a "law-abiding citizen."

In State v. O'Neill, 58 Wn. App. 367, 368 (1990), Division One held that the trial court properly precluded the defendant from testifying about his lack of criminal convictions. Division One did the same in State v. Jacobs, 194 Wash.App. 1026 (2016),[2] holding the trial court properly excluded a psychologist's testimony that the defendant lacked criminal history. Division One stated: "It is well-settled that testimony about an accused's lack of criminal convictions is not evidence of reputation and in the community and does not meet the standard for admissibility under ER 405." Id.

In this case, the defendants are also charged with assault, where character is not an essential element. Therefore, evidence that they are otherwise law-abiding citizens, lack an arrest record or criminal history should be excluded. Moreover, even if such evidence were admissible, the defense has not noted a character evidence to testify on the defendants' behalf; therefore, Mercer-Drummer would also preclude them from testifying about their own law-abiding character.

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[2] This case is unpublished and not precedential but may be cited.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

5. Motion to exclude reference to background information about the defendants without a good-faith basis that such evidence will be admitted

The State moves to preclude defense counsel from discussing background information about the defendants (i.e., their professions and where they grew up) without a good-faith basis that such evidence will be admitted. In the State's experience, defense counsel will sometimes share with the jury information about the defendants in *voir dire* or opening statements, perhaps to personalize their clients. That is well and good, but very little is known about the defendants in discovery. Therefore, defense should be precluded from sharing additional background about the defendants without a good-faith basis that such evidence will be presented, through their testimony or otherwise. No character witnesses have been listed.

6. Motion to exclude any character evidence about the victim that was unknown to Elizabeth Hokoana at the time of the shooting

The State moves to exclude any character evidence (his reputation, propensity, past acts or social media postings) about the victim, Joshua Dukes, that was unknown to Elizabeth Hokoana when she committed the shooting.

Because Elizabeth Hokoana asserts defense-of-another, she will likely argue that the victim's character is at issue. Indeed, the defense has collected the victim's social media posts and media interviews since the shooting occurred. However, evidence of a victim's character in a self-defense case is limited to what is *known* to the defendant at the time of the crime.

"Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion." ER 404(a). ER 404(a)(1) lists an exception for "Character of Victim," allowing, "evidence of a pertinent trait of character of the victim of the crime offered by the accused, or by the prosecution to rebut the same." Under the rule, "evidence of the victim's character is admissible only in cases in which the

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

defense is self-defense or suicide." State v. Jones, 19 Wash. App. 850 (1978). However, to be admissible on the issue of the defendant's state of mind:

> the victim's reputation must have been known to the defendant at the time of the incident in question. If the defendant did not know of the victim's reputation, the evidence would be irrelevant to show the defendant's state of mind at the time of the incident in question.

Tegland, Courtroom Handbook on Washington Evidence at 169 (2016-2017) (emphasis in the original).

"The justification of self-defense must be evaluated from the defendant's point of view. The legitimacy of his conduct must be evaluated in light of his the facts and circumstances known to him at the time of the shooting." State v. Despenza, 38 Wash. App. 645 (1984) (emphasis added), citing State v. Allery, 101 Wash. 2d. 591 (1984).

State v. Callahan, 87 Wash. App. 925 (1997) is a leading case cited by Tegland. In Callahan, the defendant claimed self-defense during an assault. Like Elizabeth Hokoana, Callahan denied having any knowledge of the victim before the night of the shooting. "Consequently, (the victim's) reputation for violence was not a factor affecting Callahan's perception of imminent danger and was not admissible as evidence that Callahan's apprehension was reasonable." See also, State v. Cloud, 7 Wash. App. 211 (1972) (victim's violent reputation admissible when defense shows reputation contributed to defendant's apprehension); State v. Riggs, 32 Wash.2d 281 (1949) (reputation evidence must be based upon witness's personal knowledge of victim's reputation during a relevant time period).

In this case, Elizabeth Hokoana alleges she was acting in defense-of-others when she shot the victim. The sequence of events, and the relationship of the parties, is essential to understand:

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

(1) On January 20, 2017, Marc Hokoana shot pepper spray.

(2) A stranger (the victim) ran up and grabbed Marc Hokoana.

(3) Elizabeth Hokoana shot the stranger, purportedly to defend Marc Hokoana.

The victim's past actions, statements and reputation is completely irrelevant to Elizabeth Hokoana's perception of fear. That is because she did not know the victim from Job. Elizabeth Hokoana had never met the victim, never seen his social media. Just as the defendant in Callahan denied having any "knowledge of the victim before the night of the shooting," Elizabeth Hokoana has denied any knowledge of the victim. In fact, she has denied even seeing the victim earlier in the night. This was made clear in Elizabeth Hokoana's proffer interview:[3]

> E. HOKOANA: Uh, around the time that we got there and got in line and I don't know if Marc was in the line at the same time or if he had already left to go check things out before having lost his hat uh but there had been a uh I-I realized, I learned afterwards that they're called Antifa-Antifa but it was a whole bunch of people all in uh black with hats and bandanas on and they were all marching kind of militaristically, all very organized uh with uh the-the chants that they would do Antifa… And uh they were, they had, they had flags that they were waving uh like that were black with red on them.
>
> SCHULTZ: Had you noticed anybody specifically or anybody really stand out to you in the crowd?
>
> E. HOKOANA: Nn-no.
>
> SCHULTZ: No. Had you noticed uh we'll call him, well had you noticed Josh [the victim] in the crowd at all?
>
> E. HOKOANA: No.
>
> SCHULTZ: So Josh hadn't come to your attention before?
>
> E. HOKOANA: No.

[3] Under the terms of the proffer interview, the State is not offering Elizabeth Hokoana's statement in its case in chief.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

SCHULTZ: Yeah. So had uh do you know had uh had you uh had you or Marc spoken to Josh prior to…

E. HOKOANA: No.

SCHULTZ: the start of the interaction?

E. HOKOANA: No. The people that were there to-to be violent weren't ones for talking though either.

SCHULTZ: Could you tell why Josh was there?

E. HOKOANA: No and it-it didn't matter why he was there.

***

SCHULTZ: Had you ever met Josh before that day?

E. HOKOANA: No.

***

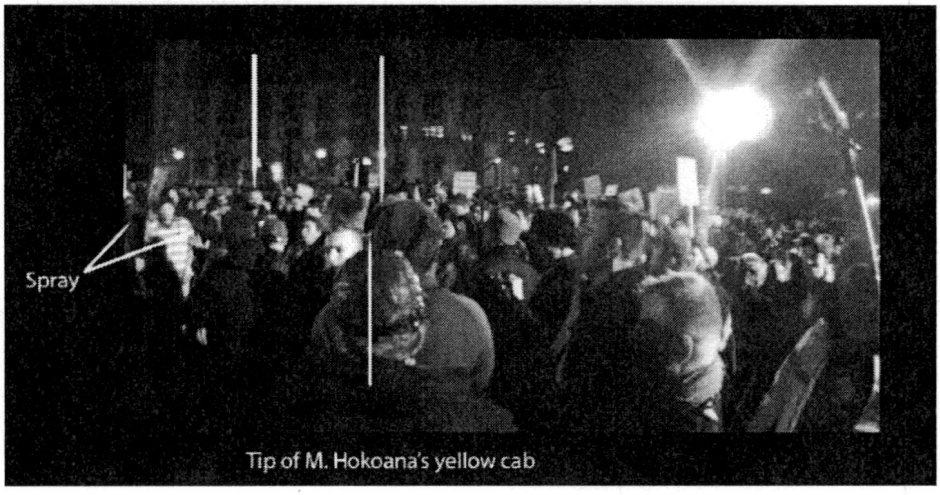
UWPD D. SCHULTZ: And you didn't have any inter-interactions uh with him that night prior to, and you didn't even notice him until he started running over to Marc?

E. HOKOANA: That's correct I never had any other interaction with him.

Therefore, the victim's character did not affect her state of mind, nor influence her perception of fear. The victim's reputation is therefore wholly not relevant and inadmissible.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

To state the obvious, the victim's character is irrelevant to Marc Hokoana's state of mind as well. Marc Hokoana claims he was acting in defense of others when he shot pepper spray at a crowd of protesters. The State expects Marc Hokoana will claim that there was some sort of physical altercation that compelled him to act in defense of others. Whether or not there was an altercation that demanded Marc Hokoana to leap in and play super hero is a question for the jury. But what is clear from the video evidence is that Marc Hokoana did not spray in the direction of the victim. Marc Hokoana shot *away* from the victim. Therefore, Marc Hokoana cannot claim that the victim was some sort of aggressor that needed to be pepper-sprayed. As a result, the victim's character is irrelevant to Marc Hokoana's perception of fear.



Elizabeth Hokoana will likely argue that despite ER 404(a) and case law prohibiting propensity evidence in an assault case, the rules should be relaxed due to her constitutional right to a fair trial. The argument was addressed in State v. Donald, 178 Wn.App. 250 (2013). Donald was a prosecution for robbery where the defendant claimed a third party was the true culprit. The defendant sought to introduce the third party's prior convictions to show a propensity for criminal behavior, but the trial court excluded the evidence under Rule 404(b). On appeal, the Court of Appeals affirmed. The Court stated:

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

> State courts have broad latitude under the Constitution to establish rules excluding evidence from criminal trials. However, a criminal defendant's constitutional right to 'a meaningful opportunity to present a complete defense' limits this latitude. An evidence rule abridges this right when it infringes upon a weighty interest of the defendant and is arbitrary or disproportionate to the purpose it was designed to serve. But the defendant's right to present a defense also has limits. The defendant's right is subject to reasonable restrictions and must yield to established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.

Id at 264.

The Court found that exclusion of propensity evidence was reasonable because it is distracting, time-consuming, and likely to influence a fact finder far beyond its legitimate probative value. Id. at 269. It is well-settled that a defendant's right to present testimony is not absolute. "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." State v. Taylor, 484 U.S. 400, 410 (1988). The defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Chambers v. Mississippi, 410 U.S. 284, 302 (1973). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Id, quoting United States v. Scheffer, 523 U.S. 303, 308 (1998). Evidentiary "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Scheffer, 523 U.S. at 308. Accordingly, a defendant's interest in presenting relevant evidence may " 'bow to accommodate other legitimate interests in the criminal trial process.' " Scheffer, 523 U.S. at 308.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

7. **Motion to preclude any witness, *other than Elizabeth Hokoana*, from testifying that the victim appeared to be affiliated with a political group or movement**

The State moves to preclude any witness, other than Elizabeth Hokoana, from testifying that the victim's appeared to belong to Antifa, anarchist groups, Black Bloc, Industrial Workers of the World, or any other political organization or movement. The State concedes that Elizabeth Hokoana can testify about her own perceptions and beliefs about the victim based on what she observed at the time of the shooting and any groups the victim appeared affiliated with. Such testimony goes to Elizabeth Hokoana's state of mind and can help explain why she feared the victim and felt compelled to act in defense of others. However, the perceptions and speculation of other witnesses about the victim's political allegiances is inadmissible character evidence, speculative, and based on hearsay.

The admissibility of a shooting victim's membership in political organizations was addressed in State v. Despenza, 38 Wash. App. 645 (1984), a leading case cited by Tegland. The State moved to preclude evidence of the victim's membership in the Ku Klux Klan and association with the American Nazi Party. Unlike the immediate trial, the defendant was aware that the victim was a member of these violent groups. The defense offered this evidence to "establish the victim's reputation for violence and the defendant's state of mind at the time of the shooting." Yet Division One held that the trial court rightfully excluded this membership:

> The justification of self-defense must be evaluated from the defendant's point of view. The legitimacy of his conduct must be evaluated in light of his the facts and circumstances known to him at the time of the shooting. The reputation of a particular group for lawlessness may be taken into account if the defendant knew the victim was a member of that group. The trial judge sought to avoid unfair prejudice by reference to the infamous Nazi Party. This was a proper reference of the court's discretion under ER 403.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

Id. (emphasis added), *citing* State v. Allery, 101 Wash. 2d. 591 (1984); State v. Smith, 2 Wash. App. 769 (1970).

In this case, dozens of black-clad, masked protesters marched together into Red Square to protest Milo Yiannopoulos' anti-transgender, xenophobic rhetoric. These black-clad protesters can be loosely described as Antifa/Anarchists/Black Block (named for the tactic of black-clad protesters blocking right-wing events).[4] These counter-protesters were readily identifiable because they wore black, carried signs and concealed their faces (purportedly to avoid having their images posted online). The victim is not expected to testify; thus, his political leanings will be unknown to the jury. However, hours of video from the event and eyewitness testimony will establish that other than wearing black, the victim was not readily identifiable as Antifa. He was not part of the procession of Antifa demonstrators as they marched in. He did not wear a face mask or carry a banner. Some witnesses have speculated that the victim appeared to be part of Antifa because he would sometimes move throughout them and he was dressed in a black leather jacket. The same could be said of the defendant, Marc Hokoana, who also wore a black leather jacket and moved throughout Antifa, though no one would claim that he was one of these protesters. Nevertheless, even if it could be definitively established that the victim was a member of this group, such evidence would be inadmissible character evidence and unfairly prejudicial. Anarchists groups have developed a violent reputation in Seattle due to May Day protests and the infamous, destructive 1999 WTO protests downtown. In more recent years, Antifa has also developed a reputation for violence and intimidation, most notably allegedly setting fires in Berkeley and other sights in response to Yiannopoulos events. Thus, by speculating, with little evidence, that the victim was associated

[4] There were scores of *other* counter-protesters who did not wear black and face masks and did not use violence or intimidating tactics.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

with this violent movement, the defense would be suggesting that the victim was acting in "conformity" "on a particular occasion," which is textbook inadmissible character evidence. ER 404(a). As has already been noted, the character of the victim in a self-defense case is inadmissible when the defendant did not know the victim. Tegland, Courtroom Handbook on Washington Evidence at 169 (2016-2017).

Testimony by any witness other than Elizabeth Hokoana that the victim appeared to be part of the Antifa protesters is not only inadmissible character evidence, it is unfairly prejudicial as well. ER 403. Several witnesses will testify that they witnessed Antifa engaging in intimidation and violence in Red Square. These witnesses will testify that Antifa threw bricks, paint balloons and beat a high school student named Alex St. Hillaire. Not one witness observed the victim engage in any sort of physical altercation, however. The witnesses do describe the victim as appearing intimidating (due to his shaved head and black leather jacket), but there is no evidence whatsoever that he engaged in violence. Thus speculation by witnesses that the victim was tied to the Antifa tactics that night is unfairly prejudicial to the State because it is guilt by association. Moreover, the fact that the victim was a member of the Industrial Workers of the World was unknown to all witnesses until his membership card was located in his wallet after he was shot.

8. Motion to exclude hearsay statements by the victim

The victim has given various interviews to the media and the police about the facts of this case. In general, the victim has repeatedly described grabbing Marc Hokoana and trying to wrestle the pepper spray out of his hand. The victim's statements about this case should be excluded because they are hearsay, offered for the truth of the matter asserted, and no exception

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

applies. Moreover, admission of only a portion of the victim's statements would open the door to the entirety of his statement describing the assault.

Elizabeth Hokoana will likely argue that her right to a fair trial necessitates bending the hearsay and other rules of evidence. However, a defendant does not have a due process right to introduce hearsay. State v. Lizarraga, 191 Wash. App. 530 (2015), *review denied*, 185 Wash. 2d 1022 (2016). The United States Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense. Holmes v. South Carolina, 547 U.S. 319, 324 (2006). The fundamental due process right to present a defense is the right to offer testimony and compel the attendance of a witness. However, the defendant's right to present testimony is also not absolute. "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." State v. Taylor, 484 U.S. 400, 410 (1988).

The defendant's right to present a defense is subject to "established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence." Lizarraga, 191 Wash. App. at 553, *quoting* Chambers v. Mississippi, 410 U.S. 284, 302 (1973). "[S]tate and federal rulemakers have broad latitude under the Constitution to establish rules excluding evidence from criminal trials." Id, *quoting* United States v. Scheffer, 523 U.S. 303, 308 (1998). Evidentiary "rules do not abridge an accused's right to present a defense so long as they are not 'arbitrary' or 'disproportionate to the purposes they are designed to serve.'" Scheffer, 523 U.S. at 308. Accordingly, a defendant's interest in presenting relevant evidence may " 'bow to accommodate other legitimate interests in the criminal trial process.' " Scheffer, 523 U.S. at 308.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

Lizarraga was a murder prosecution in front of the Honorable Patrick Oishi. Lizarraga argued that the trial court violated his constitutional right to present a defense by denying his motion to introduce the out-of-court hearsay statement of a witness that someone else shot the victim. The witness had been deported to Mexico. The Court found that the defense made no attempt to interview the witness until right before trial and the defense did not request a material witness warrant for his testimony until the day before trial began. Once the defendant's material witness warrant was issued, the prosecution then took steps to get the warrant online and sent an alert to law enforcement concerning the outstanding warrant. The Court of Appeals found that the trial court did not violate the defendant's right to present a defense given the long-recognized hearsay rules. Lizarraga at 559.

In this case, the victim's statements are undoubtedly hearsay because they are out-of-court statements offered for the truth of the matter asserted. There is no other purpose for these statements. They cannot be offered for impeachment, since the State is not admitting any of the victim's statements. They cannot be offered to show his character (which would still be for the truth of the matter) because a victim's character is not admissible in a self-defense case when the victim is unknown to the defendant, as discussed *supra*.

Enforcement of the hearsay rule in no way limits Elizabeth Hokoana's right or ability to put on a defense. The defense has subpoenaed more than thirty witnesses, including many eyewitnesses who can describe the victim's actions that night, and defense will call no less than three self-defense experts who will offer the opinion that Elizabeth Hokoana's force was justified. The State has subpoenaed the victim and personally met with him, his family and his attorney on several occasions, including in his home. When the victim refused to abide by a deposition order, the State informed defense it could assist with the logistics of their obtaining a

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

material witness warrant for him if they so decided, but the State would not seek its own warrant. The defense has, understandably, decided not to seek a material witness warrant for the victim. Yet the victim's counsel has indicated that the victim *would* abide by a material witness warrant and would testify if a warrant were sought by the defense. Given that defense has not done this, and there is no prejudice to Elizabeth Hokoana's defense, this Court should enforce the hearsay rules and exclude the victim's out-of-court statements.

9. Motion to exclude 2017 Berkeley Protests at Yiannopoulos Event

The State moves to prohibit any witness from testifying about the violence and destruction surrounding the infamous 2017 protest of a Yiannopoulos speech that occurred *after* the charged incident. The charged incident occurred January 20, 2017. Yiannopoulos was scheduled to speak at the University of California in Berkeley eleven days later. *Berkeley Cancels Milo Yiannopoulos Speech, and Donald Trump Tweets Outrage*, New York Times, Feb. 1, 2017. According to the New York Times, Black Bloc protesters, including those from Antifa, forced the cancellation of the event by setting fires and otherwise damaging property.

Because the Berkeley protesters occurred *after* the charged incident, it could not have been a basis for Elizabeth Hokoana's claimed fear of Antifa in general or the victim in particular. Nevertheless, in pretrial interviews, many of the defense witnesses who were in Red Square to attend the Yiannopoulos event have pointed to the Berkeley events as an example of the sort of tactics that Antifa will resort to. Whether or not that is a fair characterization, the fact of the matter is that there is no evidence that the UW Antifa protesters were the same as those at Berkeley. Moreover, such evidence would be inadmissible propensity evidence prohibited by ER 404(a) and is unfairly prejudicial and would waste time. ER 403.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

10. Motion to Exclude Witnesses

The State moves this Court for an order excluding all witnesses from the courtroom except during their own testimony under ER 615. The State reserves the right to have the lead officer remain at counsel table during trial.

11. Motion to exclude evidence or argument about potential penalties

The State moves to prohibit the defendant from arguing, eliciting testimony, offering evidence, suggesting, or alluding in any way to the possibility of punishment, or effect of punishment.

12. Disclosure of defense

The general nature of the defense disclosed at omnibus is general denial/defense of others. The State moves to preclude questioning and argument on any other defense.

13. Disclosure of defense witnesses

The State moves for disclosure of defense witnesses, including their names, dates of birth, phone numbers, summary of testimony and the substance of all oral statements made. CrR 4.7(b).

14. Motion to limit defense investigator Aimee Rachunok's testimony to impeachment

The defense notified the State on the eve of trial that Rachunok may testify as an impeachment witness, or for substantive purposes, depending on the State's case. The State moves to limit her testimony to impeachment only. CrR 4.7(b) requires disclosure of any witnesses that the defense will call at trial "by omnibus." The rule also requires disclosure of any recorded or written statements of that witness, along with the "substance" of "any" oral

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

statement by that witness. Id. The State has made repeated requests for disclosure of the *substance* of any oral statement of the witnesses. The parties read the rule differently in terms of what defense is required to disclose. Nevertheless, while the defense has diligently disclosed all of the interviews that Rachunok has conducted, it has not disclosed any other statement by her or provided a summary of her potential substantive testimony. The defense may argue that her substantive testimony would only be for rebuttal. But the defense's entire case could be considered "rebuttal." Because the defense has not provided timely notice of Rachunok's substantive testimony by omnibus, her testimony should be limited to impeachment.

15. Motion to compel discovery of all defense exhibits

The State moves for an order compelling the defendant to produce, prior to trial, any potential defense exhibits and allow inspection of the physical or documentary evidence in the defendant's possession that may be offered by the defendant during any stage of the trial, including cross examination of State's witnesses, in the defense case, or in rebuttal. CrR 4.7.

16. Motion for Production of Statements, Transcripts, Recordings, or Summaries Pertaining to Defense Interview(s) of State's Witnesses.

The State moves for an order compelling the defendant, prior to trial, to provide the State with any other written or recorded statements of the State's witnesses in his possession. If these statements were not written or recorded, the State requests that it be provided with the substance of the witnesses' statements to the defense investigator or defense counsel. This is not a request for work product; the State is not requesting the defense to provide its mental impressions about the case. This motion is based on CrR 4.7 and State v. Yates, 111 Wn.2d 793, 765 P.2d 291 (1988).

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

17. Motion to Preclude the Defendant from Offering any Prior Misconduct Evidence of State's Witnesses Pursuant to ER 404(a), 404(b) and 608(b).

Admission of a witnesses' alleged prior misconduct is severely restricted, cannot be proved by extrinsic evidence, and is permitted only on cross-examination if probative of truthfulness or untruthfulness. Evidence Rule 608(b) provides:

> Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, *may not be proved by extrinsic evidence*. They may, however, in the discretion of the court, if *probative of truthfulness* or *untruthfulness*, be inquired into on cross-examination of the witness (1) *concerning his character for truthfulness or untruthfulness*, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

(Emphasis supplied.)

Cross-examination of a witness regarding prior alleged acts of misconduct is improper unless those acts bear on the witness's veracity. In State v. Harper, the court properly excluded evidence of a witness's prior check forgeries because they merely attacked the witness's honesty, not her veracity. 35 Wn. App. 855, 861-62 (1983). Therefore, the defense should be precluded from offering any prior alleged acts of misconduct by the State's witnesses.

Additionally, the defense should not be permitted to cross-examine any State's witness about any prior instances of alleged misconduct pertaining to truthfulness unless it first makes an offer of proof through witnesses who would testify to such misconduct as impeachment. The State moves in limine to preclude such cross-examination unless the State is afforded the opportunity, outside the jury's presence, to voir dire such witnesses as to any alleged acts of misconduct.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

Finally, if the defense does call any witnesses to testify to a witness's reputation for truthfulness, the inquiry must be limited to the well-established three-question formula first articulated in State v. Argentieri, 105 Wn. 7, 177 P. 690 (1919):

> The orderly and proper way to put in evidence of this sort, after the witness has testified to acquaintanceship with the defendant not too remote in point of time, is to have the witness answer no or yes, as the fact is, to the question, if he knows what the general reputation of the defendant is in the community in which he resides, for the particular trait of character (naming it) that is relevant to and involved in the crime with which the defendant is charged. If the witness answers no, that ends the inquiry. If he answers yes, then the next and final question should be: What is it, good or bad?

State v. Argentieri, 105 Wash. 7, 177 P. 690 (1919), quoted with approval in 5A Tegland, *Washington Practice, Evidence*, § 124 at 307 (1982), cited in State v. Kelly, 102 Wn.2d 188, 194 (1984) (emphasis added). Opinion testimony regarding a witness's veracity is, of course, never admissible. State v. Kelly, 102 Wn.2d 188 (1984); ER 608(b); ER 701.

Here, the State asks for an offer of proof as to which prior misconduct or bad acts the defendant intends to elicit regarding any of the state's witnesses, including any evidence under ER 404(a) or (b), ER 608, or ER 609.

18. Motion to Preclude Criminal Convictions of any State Witness

Prior convictions are generally inadmissible. ER 609 governs the use of prior convictions to impeach a witness. Under ER 609, prior convictions are admissible for impeachment if (1) The punishment for the offense is over one year and the probative value outweighs the prejudice or; (2) The crime involves dishonesty. If the defense intends to elicit any convictions, the State requests identification of those convictions at this time so that the Court may determine the admissibility prior to the witnesses' testimony outside the presence of the jury.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

HEARSAY MOTIONS

19. Motion to prohibit witnesses from repeating what other attendees or police told them

A number of witnesses in pretrial interviews have repeated what other witnesses have told them. This is inadmissible hearsay. This particular prosecutor is hesitant to litigate hearsay objections pretrial. However, given the number of civilian witnesses in this case, it is reasonable for all parties to speak to their witnesses about limiting their testimony to their personal knowledge and not repeat what others told them.

In particular, the State moves to exclude the following hearsay:

- Civilian Kuykendall: Statement from a stranger that he stopped a person from throwing a rock at a girl. Kuykendall acknowledged during a pretrial interview, "I didn't see this with my own eyes but this gentleman seemed sincere about it."
- Civilian Hayward: Heard "bits of information about the horror show outside" Kane Hall, while sitting inside Kane Hall.
- Officer Eastman: heard over police radio that bricks were being thrown and individuals were injured.
- Officer Wartts-Smiles: heard over police radio about "scuffles breaking out and things being thrown." Officer acknowledged, "I just didn't observe any of it."
- Officer Bentley: Statements by a cameraman who claims he was assaulted. Notably, the cameraman had been listed as a defense witness but now is no longer being called.

20. Motion to admit victim's excited utterances

The State moves to admit the victim's statement to first responders, moments after he was shot, in which he provided his name and date of birth. These statements are excited utterances because they came following a startling event and while the victim was still under the stress of being shock. The State will lay foundation for these statements through first

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

responders including Officers Wartts-Smiles who recalled that the victim was in "shock" and "in and out of consciousness" when he supplied his name and date of birth. Defense Interview at 17.

21. Motion to exclude statements in radio traffic that victim was armed with a "large knife"

During the chaotic minutes after the shooting, SPD Sgt. Truscott broadcast over SPD radio that the victim was "armed with brass knuckles and a large knife." This radio traffic was recorded and obtained by the defense from Seattle Police prior to filing. The radio traffic has also been referenced by the defense in a local television interview in arguing why Elizabeth Hokoana why the defendant was justified in shooting the victim. After the radio traffic became public, Elizabeth Hokoana claimed in her proffer interview that she needed to shoot the victim because she saw a knife in the victim's hand; she has never claimed to see brass knuckles.

Whatever the merits of the defendant's claim that she saw a knife in the victim's hand, Sgt. Truscott's statement over police radio is rank hearsay, and no exception applies. The statement would be offered for the truth of the matter asserted, namely that the victim was armed with a knife. Indeed, that is the heart of Elizabeth Hokoana's defense. Therefore, it should be excluded.

Even if an exception did apply to the radio traffic, the statement should still be excluded as unreliable. The fact of the matter is the statement was made during the chaotic minutes after a shooting in the middle of a protest, moments when first responders were providing first aid to the victim and had no idea if there was an active shooter. As it turns out, parts of Sgt. Truscott's radio broadcast is not only unreliable, it was wrong. The victim was *not* in possession of brass knuckles. Police later did an inventory of the victim's possessions and

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

discovered a grip strengthener. Truscott later confirmed after the fact that she had mistaken the grip strengthener for brass knuckles and broadcast that erroneous information over the radio.

The defense, of course, is welcome to elicit the fact that police found two knives with the victim's clothes during his medical treatment. Those knives have been inventoried by the police, photographed by the defense and will undoubtedly be admitted to support Elizabeth Hokoana's claim that she saw a knife on the victim's person. Moreover, the defense can elicit the fact that Truscott saw a knife in the victim's clothes when she testifies as a witness. If she denies seeing the knife, defense can impeach with the officer's statement. But the defense should not be permitted to admit unreliable hearsay where no exception applies.

22. Motion to exclude victim's out-of-court statements that he was carrying knives

During a statement to the police in April 2017, the victim stated that on the night of the shooting, he was carrying three knives on his person, which he always carries. Those knives were a Benchmade folding knife in right jacket pocket, purchased from REI; a Benchmade Griptilian used as a box cutter, clipped into his right pants pocket; and a Leatherman knife carried on his belt. The defense may seek to elicit these statements to support Elizabeth Hokoana's claim that she saw a knife in the victim's hand. Moreover, only two knives were found on the victim's person when his clothes were inventoried. The defense would no doubt like to argue that the reason only two knives were recovered is the third knife – the one purportedly in the victim's hand – was dropped during the altercation and never recovered. The victim's out-of-court statements are unmistakable hearsay, however, clearly offered for the truth of the matter asserted. Because no hearsay exception applies, the statements should be excluded.

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

Elizabeth Hokoana will likely argue that while the victim's out-of-court statements are hearsay, exclusion of those statements would violate her constitutional right to present a defense. But the right does not extend to inadmissible evidence. State v. Aguirre, 168 Wn.2d 350, 363 (2010) (although the defendant has a "constitutional right to present a defense, the scope of that right does not extend to the introduction of otherwise inadmissible evidence"); State v. Mee Hui Kim, 134 Wn.App. 27, 41 (2006) (defendant has right to present a defense "consisting of relevance evidence that is not otherwise inadmissible").

23. Motion to admit part of Blake Filo's statement as recorded recollection

Blake Filo told police in 2017 that he heard Marc Hokoana approach the Antifa protesters and call them "Libtards" and "Snowflakes," derogatory terms for individuals on the political left. (Hokoana also used the term Snowflakes in the Facebook messages that will be offered in which he states his intent to "crack skulls" in Red Square.) During his recent defense interview, however, Filo could not remember the names that he heard Hokoana using to taunt the protesters. Nevertheless, Filo stated in his interview that when he spoke to Detective Bergin in January 2017 the events were "fresh" in his memory.

The State believes it can lay proper foundation to admit Filo's previous statement as a Recorded Recollection. A recorded recollection is a memorandum or statement about which the witness once had knowledge but now has insufficient recollection to enable the witness to testifify fully and accurately. ER 803(a)(5). Under Rule 803(a)(5), the proponent of the writing must make a foundation showing that: (a) the record pertains to a matter about which the witness once had personal knowledge, (b) the witness now has an insufficient recollection about the matter to testify fully and accurately, (c) the record was made or adopted by the witness

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009

when the matter was fresh in the witness's memory, and (d) the record reflects the witness's prior knowledge accurately.

The rule does not even require a foundation showing that the recollection was recorded in writing. § 803.28Foundation requirements—Case law interpretations, 5C Wash. Prac., Evidence Law and Practice § 803.28 (6th ed.). "[T]he rule is broad enough to include statements that are, for example, recorded on a tape recorder." Id; *see e.g.* State v. Alvarado, 89 Wash. App. 543 (1998) (admission of eyewitness's audio recorded statement to police about murder). In the leading case of Alvarado, Division One held that the rule does not require the State to produce the witness to affirmatively vouch for record's accuracy.

In the event Filo cannot remember the names used by Marc Hokoana to taunt protesters, the State will seek to lay foundation for recorded recollection.

CONCLUSION

This memorandum has been prepared solely to acquaint the trial court with the issues as they will be presented at trial.

DATED this 12th day of June, 2019.

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By:

Raam Wong, WSBA #45486
Senior Deputy Prosecuting Attorney

Daniel T. Satterberg, Prosecuting Attorney
Criminal Division
W554 King County Courthouse
516 Third Avenue
Seattle, WA 98104-2385
(206) 296-9010, FAX (206) 296-9009